UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

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ACME BUS CORPORATION)))
and) <u>Case No. 2-CA-38981</u>
TEAMSTER LOCAL 445) <u>Case No. 2-CA-39422</u>)
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REPLY MEMORANDUM SUBMITTED ON BEHALF OF ACME BUS CORPORATION

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Alan B. Pearl, Esq. Alan B. Pearl & Associates 6800 Jericho Turnpike Syosset, New York 11791 This Reply Memorandum is submitted, pursuant to NLRB Rules and Regulations § 102.46(h), on behalf of the Respondent Employer, ACME Bus Corporation ("ACME"), in support of the Exceptions filed to the decision of the Administrative Law Judge (the "Judge") in the above-referenced case.

1. The Discharge of Mieses Did Not Violate The Act

ACME showed in its opening brief that it had legitimate business reasons for terminating Mieses and that it otherwise would have terminated her even in the absence of her alleged protected activity. The General Counsel in its opposition brief claims that the Judge correctly found that no evidence was presented to support the discharge, and otherwise the defendant did not meet its burden of showing legitimate reasons to discharge Mieses.

In the hearing though, the General Counsel's own witness, Danea Wolven ("Wolven") clearly and unequivocally testified that Mieses was rude and disruptive to the office staff. (TR 281-82) Wolven, who was specifically credited as a witness by the Judge, testified without rebuttal that every event that she detailed in her memo (Exh. GC 14) seeking the termination of Mieses occurred, and it was Wolven who requested the termination. (TR 281-85) In addition, Wolven explained again without rebuttal that the fueling issue which was one of the problems with Mieses occurred over a period of time that Mieses repeatedly refused to follow her instructions. (TR 284) The Judge engaged in improper speculation and analysis of a time sheet exhibit concerning the fueling (TR-G(14)) which is not supported by any testimony and is in fact contradicted by the General Counsel's own witness. (TR 284) In this regard, the General Counsel and the Judge interpreted the time sheets for August 4th to indicate that Mieses had not actually done any fueling work after being told to stop in August, but in fact the testimony was that the fueling issues started in July when ACME was at the temporary location (see GC 15) and

that the August 4th time records showed this was not the first time it occurred but was a repeat violation after having been warned. (TR 284) Since unrebutted evidence at the hearing came from the General Counsel's own witness, ACME more than met its burden to show that the discharge of Mieses was for legitimate reasons, and a number of employees that were discharged on the same day for similar reasons. Thus her alleged protected activity had nothing to do with the discharge.

2. The Discharges of Pomella and Haskell Did Not Violate The Act

In its opposition brief, the General Counsel essentially concedes as found by the Judge that Pomella and Haskell did not call in a serious safety incident involving a child on their bus. The Judge concluded though, and the General Counsel agrees, that this admitted conduct cannot justify a legal termination by ACME because ACME cannot show another similar incident. The Judge also impermissibly substituted its own business judgment concerning whether this safety violation was sufficiently severe in order to justify discharging Pomella and Haskell.

The Judge and the General Counsel engaged in extensive speculative analysis to support their claim that the failure to call in an incident is not an important safety issue. First, they highlight that no procedures exist regarding "no calls" and then suggest that incident reports showing child injuries involve "no calls" because there is no evidence to suggest a call was made. In fact, not a single witness testified that another "no call" ever occurred. Dispatcher Cuddy specifically said that no failure to call in incidents occurred and the daily log sheet introduced as evidence focused on attendance issues. (TR 1164-70) This child hit her head on a hard floor of a bus and these two employees did not call to tell ACME about this incident. They had no idea how serious the head injury was at the time, and their inaction represented a serious, life-threatening risk to the child. No protected activity should immune a bus driver who intentionally exposes a child to such a risk.

Further, the fact is that the "protected" activity occurred almost six months before this incident, and both worked without incident the entire time. Pomella was spoken to about work issues on a couple of occasions, but no discipline, let alone discharge, occurred. It is only due to this complete disregard for child safety that the termination occurred. That evidence itself fully supports the inference this termination would have occurred in absence of protected activity. It is not reasonable to require the exact reason to have already occurred in order to prove this factor.

As the Respondent showed in its opening brief, given the direct safety violation found and the fact that the employer had a policy requiring this notice; its termination decision is entitled to deference and should be found to be lawful. The discharge of Cheatem and Mercado for essentially the same violation requires the same result.

3. <u>Terminations of Kuhhorn, Cheatham and Mercado Were Decided by Jim Poisella</u> and Should Be Upheld

One of the primary factors that the General Counsel highlights in support of the Judge's decision finding the terminations of Kuhhorn, Cheatham and Mercado to have violated the Act was the fact that Charles Mazzei, the Manager of the Company's facility, made or influenced the termination decision.

There simply was no evidence presented, other than unsupported speculation of the Judge and the General Counsel, that Mr. Mazzei was the decision-maker or even an influence in the decisions to terminate Kuhhorn, Cheatham and Mercado. All the witnesses, including the General Counsel's witness, Wolven, testified that it was ACME's Human Resources Director, Jim Poisella, who made the decision to terminate these persons (TR 278-80). His decision was based on information he received from many sources. These included Wolven (TR 278-80), dispatcher Cuddy, the employees themselves, and his own sources. Wolven or Cuddy filled our

each termination form sent to Poisella. (GC Exhs. 14, 17 and 18) There was no evidence presented with respect to any of these sources that the information was tainted, wrong or incorrect. Poisella made his decision to terminate based upon this evidence (TR 1151, 1174, 1163) and his articulated reasons fully support the Company's contention that it had legitimate business reasons to terminate these persons and that otherwise Poisella would have made his decision notwithstanding the alleged protected activities of these persons.

CONCLUSION

For these reasons and for reasons set forth in the Company's opening brief, the Company respectfully requests that its Exceptions be granted and that the decision of the Judge be overturned and modified as requested in its opening Brief and Exceptions.

Dated: Uniondale, New York July 9, 2010

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CERTIFICATE OF SERVICE

I, John K. Diviney, counsel for Respondent herein, certify that I served on July 9, 2010, Respondent's Reply Memorandum Submitted on Behalf of ACME Bus Corporation on:

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Dated: July 9, 2010

JOHN K. DIVINEY